MAR 28 2003

No. 02-679

IN THE

Supreme Court of the United States

DESERT PALACE, INC., D/B/A CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; AMERICAN CIVIL LIBERTIES UNION; AARP; AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; AND WOMEN EMPLOYED AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

MICHAEL C. SUBIT*
FRANK, FREED, ROBERTS SUBIT, & THOMAS, LLP
705 Second Avenue
Suite 1200
Seattle, WA 98104
(206) 682-6711
* *Counsel of Record*

BARBARA R. ARNWINE
THOMAS J. HENDERSON
MICHAEL L. FOREMAN
KRISTIN M. DADEY
THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8600

(Additional Counsel Listed on Inside Cover)

BEST AVAILABLE COPY

THOMAS W. OSBORNE
LAURIE A. MCCANN
DANIEL B. KOHRMAN
AARP FOUNDATION LITIGATION
MELVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049

DENNIS C. HAYES
GENERAL COUNSEL
YOLANDA Y. RILEY
THE NATIONAL
ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PERSONS
4805 Mt. Hope Drive
Baltimore, MD 21215

ANDY IMPARATO
PRESIDENT & CEO
AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES
1629 K Street, NW
Suite 503
Washington, DC 20006

STEPHEN R. SHAPIRO
LENORA M. LAPIDUS
JENNIFER ARNETT LEE
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004

VINCENT A. ENG
NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036

JUDITH L. LICHTMAN
JOCELYN C. FRYE
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1875 Connecticut Avenue, NW
Suite 650
Washington, DC 20009

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

STATEMENT OF INTEREST.....1

SUMMARY OF ARGUMENT.....4

ARGUMENT

I. *McDonnell Douglas-Burdine* And *Price Waterhouse v. Hopkins* Are Simply Alternative Ways To Prove A Title VII Defendant Acted "Because Of" Discrimination.....5

II. Under The Civil Rights Act of 1991, A Title VII Plaintiff Shows The Defendant Acted "Because of" Discrimination By Showing Unlawful Bias Was "A Motivating Factor".....7

III. *Hopkins* Does Not Require A Plaintiff To Have "Direct" Evidence To Shift the Burden Of Persuasion To The Defendant, And, In Any Event, The Civil Rights Act Of 1991 Modifies the Applicable Holding Of That Case.....13

A. Justice White's Opinion Controls *Hopkins*..13

B. Congress Adopted the *Hopkins*' Plurality's Approach To Shifting The Burden Of Persuasion.....16

IV. *McDonnell Douglas-Burdine* Remains A Vital Tool For Resolving Whether A Title VII Defendant Acted "Because Of" Unlawful Discrimination.....18

V. Any Attempt to Define "Direct" Evidence Is Futile.....25

CONCLUSION.....26

TABLE OF AUTHORITIES

CASES

Allen v. Iranon,
283 F.3d 1070 (9th Cir. 2002).....15

Ballard v. Muskogee Reg'l Med. Ctr.,
238 F.3d 1250 (10th Cir. 2001).....15

Cabrera v. Jakabovitz,
24 F.3d 372 (2d Cir. 1994).....24

Cassino v. Reichold Chem. Inc.,
817 F.2d 1338 (9th Cir. 1987).....24

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992).....8

Costa v. Desert Palace Inc.,
299 F.3d 838 (9th Cir. 2002) (en banc).....9,10,20

Dews v. A.B. Dick Co.,
231 F.3d 106 (6th Cir. 2000).....19

Fields v. N.Y. State Office of Mental Retardation & Developmental Disabilities,
115 F.3d 116 (2d Cir. 1997).....21

Fite v. Digital Equip. Corp.,
232 F.3d 3 (1st. Cir. 2000).....24

Fuentes v. Perskie,
32 F.3d 759 (3d Cir. 1994).....21

Furnco Constr. Corp. v. Waters,
438 U.S. 567 (1978).....5,19

Gering v. Case Corp.,
43 F.3d 340 (7th Cir. 1994).....23

Gonzales v. Dallas County,
249 F.3d 412 (5th Cir. 2001).....15

Graning v. Sherburne Cty.,
172 F.3d 611 (8th Cir. 1999).....15

Harris v. Shelby County Bd. of Educ.,
99 F.3d 1078 (11th Cir. 1996).....9,10

Hartford Underwriters Ins. Co. v. UnionPlanters Bank, N.A.,
530 U.S. 1 (2000).....8

Hellstrom v. U.S. Dep't of Veterans Affairs,
201 F.3d 94 (2d Cir. 2000).....15

Lynch v. City of Boston,
180 F.3d 1 (1st Cir. 1999).....15

Marks v. United States,
430 U.S. 188 (1977).....14

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973).....passim

Miller v. Cigna Corp.,
47 F.3d 586 (3d Cir. 1995).....21

Moore v. Robertson Fire Prot. Dist.,
249 F.3d 786 (8th Cir. 2001).....24

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977).....13

Nichols v. United States,
511 U.S. 738 (1994).....15

NLRB v. Transp. Mgmt. Corp.,
462 U.S. 393 (1983).....13

Palmer v. Bd. of Regents of the Univ. Sys. of Ga.,
208 F.3d 969 (11th Cir. 2000).....24

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989).....passim

Pugh v. City of Attica,
259 F.3d 619 (7th Cir. 2001).....15

Reeves v. Sanderson Plumbing Prod., Inc.,
530 U.S. 133 (2000).....passim

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997).....8

Skidmore v. Swift & Co.,
323 U.S. 134 (1944).....16

Smith v. Borough of Wilkinsburg,
147 F.3d 272 (3d Cir. 1998).....24

Sowards v. Loudon County,
203 F.3d 426 (6th Cir. 2000).....15

Spanier v. Morrison's Mgmt. Servs. Inc,
822 F.2d 975 (11th Cir. 1987).....15

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993).....5, 24

Texas Dept. of Cmty. Affairs v. Burdine,
450 U.S. 248 (1981).....passim

Townshend v. Lumbermens Mut. Cas. Co.,
294 F.3d 1232 (10th Cir. 2002).....24

Thomas v. NFL Players Ass'n,
131 F.3d 198 (D.C. Cir. 1997).....10

Tyler v. Bethlehem Steel Corp.,
958 F.2d 1176 (2d Cir. 1992).....10

Tyler v. Re/Max Mountain States, Inc.,
232 F.3d 808 (10th Cir. 2000).....21

United States Postal Serv. Bd. of Governors v. Aikens,
460 U.S. 711 (1983).....9

Wascura v. City of S. Miami,
257 F.3d 1238 (11th Cir. 2001).....21

Waters v. Churchill,
511 U.S. 661 (1994).....15

Wilson v. Am. Gen. Corp.,
167 F.3d 1114 (7th Cir. 1999).....21

Wolf v. Buss (Am.) Inc.,
77 F.3d 914 (7th Cir 1996).....19

STATUTES

Civil Rights Act of 1964, Title VII.....passim

Civil Rights Act of 1991, Pub. L. No 102-166,
105 Stat. 1071 (1991).....passim

42 U.S.C. § 2000e(m).....7

42 U.S.C. § 2000e-2(a).....5,11

42 U.S.C. § 2000e-2(b), (c) & (d).....5,11

42 U.S.C. § 2000e-2(k).....8

42 U.S.C. § 2000e-2(m).....passim

42 U.S.C. § 2000e-5(g)(2)(B).....12

42 U.S.C. § 2000e-5(g)(2)(B)(i)-(ii).....8

MISCELLANEOUS

EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment (BNA) 405:6915 (July 7, 1992)....16

1 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice & Instructions* § 15.02 (3d ed. 1977).....10

H.R. Rep. No. 102-40(I), pt. 1 (1991).....18

STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties, in support of Respondent's argument that the Ninth Circuit properly held that Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, does not require a plaintiff to submit "direct" evidence of discrimination to have a jury instructed that an unlawful employment practice is established when a protected trait played "a motivating factor" in the employer's adverse action.[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

AARP is a nonprofit membership organization of more than 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans. More

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

than fifty percent of AARP's members remain active in the work force and, thus, rely on the protections of Title VII, the Age Discrimination in Employment Act, and other federal laws prohibiting employment discrimination that will be affected by the Court's decision in this case. AARP has long advocated the liberal interpretation and vigorous enforcement of these statutes, which are of paramount importance to all employed people, including millions of older workers, who rely on them to deter, prevent, and remedy invidious discrimination in the work place.

The American Association of People with Disabilities ("AAPD") is the largest membership organization for people with disabilities, their family members and supporters. AAPD has a strong interest insuring laws like Title VII and the Americans with Disabilities Act are interpreted in a manner that provides maximum protection for our members' employment rights.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization of more than 300,000 members. The ACLU's Women's Rights Project has been a leader in the efforts to eliminate barriers to women's full equality.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in addressing matters of employment discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts

The National Partnership for Women & Families ("National Partnership") is a national advocacy group that develops and promotes equal opportunity, quality health care, and economic security for women and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities.

Women Employed is a national membership association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed is committed to ensuring that laws such as Title VII are interpreted in a manner that provides maximum employment protection for all individuals.

This case involving the interpretation of the Civil Rights Act of 1991 is a matter of significant concern to all *amici* and will directly affect the rights of those they serve.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991 entitles all disparate treatment discrimination plaintiffs to establish the defendant acted "because of" discrimination in violation of the law by showing unlawful bias was "a motivating factor" in the adverse employment action. Petitioner's contention that the "a motivating factor" standard is limited to plaintiffs with "direct" evidence ignores the language, structure, and purposes of Title VII.

Price Waterhouse v. Hopkins does not require a plaintiff to have "direct" evidence to shift the burden of persuasion to the defendant, and the Civil Rights Act of 1991 supersedes that decision. In conjunction with the "a motivating factor" standard of causation, the *McDonnell Douglas-Burdine* framework remains a vital evidentiary tool in both "single motive" and "mixed-motives" discrimination cases. With some further elaboration, the instructions given at trial in this case provide a clear and coherent method, suitable for all Title VII disparate treatment actions, for a jury to resolve both the defendant's liability for discrimination and the plaintiff's entitlement, if any, to monetary damages.

ARGUMENT

I. *McDonnell Douglas-Burdine* And *Price Waterhouse v. Hopkins* Are Simply Alternative Ways To Prove A Title VII Defendant Acted "Because Of" Discrimination.

Titie VII prohibits employers from discriminating against employees "because of" race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). Similarly, the statute prevents employment agencies, labor organizations, and training programs from discriminating "because of" a prohibited characteristic. 42 U.S.C. § 2000e-2(b), (c) & (d). The central focus in any disparate treatment case is whether the defendant has treated some people less favorably than others "because of" an unlawful reason. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The Court has previously set forth two frameworks through which a plaintiff may meet the statutory burden. The first of these traces it origins to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Both *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000), further clarified the mechanics of the so-called *McDonnell Douglas-Burdine* framework.

Under *McDonnell Douglas-Burdine*, the plaintiff first establishes a *prima facie* case of discrimination. *Hicks*, 509 U.S. at 506. The *prima facie* case eliminates the most common possible non-discriminatory explanations for the defendant's conduct. *Burdine*, 450 U.S. at 254; *Furnco*, 438 U.S. at 577, 579-80. If the plaintiff establishes a *prima facie* case, then a rebuttable presumption of discrimination arises.

Hicks, 509 U.S. at 507. The defendant must produce some evidence of a legitimate non-discriminatory reason for its actions, or the plaintiff is entitled to judgment as a matter of law. *Id.*

If the defendant meets its burden of production, the presumption of discrimination dissipates. *Id.* The plaintiff must then must show that the defendant acted "because of" unlawful discrimination. *Id.* at 508. Under *McDonnell Douglas-Burdine*, the plaintiff may do so either (1) "directly" by proving that the defendant more likely than not acted "because of" a discriminatory reason; or (2) "indirectly" by showing the defendant's proffered explanation is "unworthy of belief" and a mere pretext for discrimination. *Burdine*, 450 U.S. at 256; *Reeves*, 530 U.S. at 143. If a plaintiff proves that the defendant's explanation is "unworthy of belief," the finder of fact may, but need not, infer the defendant acted "because of" discrimination. *Reeves*, 530 U.S. at 147-48.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), six Justices agreed that *McDonnell Douglas-Burdine* was not the sole method through which a plaintiff could prove the defendant acted "because of" discrimination. The four-Justice plurality, Justice White, and Justice O'Connor differed as to how a plaintiff could show discrimination "because of" a prohibited factor. All six Justices of the *Hopkins* majority concluded, however, that if the plaintiff shows that an unlawful motivation played some part in the defendant's action, the defendant avoids liability altogether by proving it would have taken the same action in any event. The defendant thereby shows that discrimination was not a "but-for" cause of its actions. The method of proof the Court set forth in *Hopkins* has become known as the "mixed-motives" framework.

II. Under The Civil Rights Act Of 1991, A Title VII Plaintiff Shows The Defendant Acted "Because Of" Discrimination By Showing Unlawful Bias Was "A Motivating Factor."

Responding to *Hopkins*, in 1991 Congress added three provisions to Title VII. Civil Rights Act of 1991, Pub. L. No 102-166, 105 Stat. 1071 (1991). First, Congress resolved the debate among the Justices in *Hopkins* as to the meaning of "because of" by providing that

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

Section 107(a), codified at 42 U.S.C. § 2000e-2(m) (emphasis added). Second, Congress defined "demonstrates" as "meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

Third, Congress disagreed with the *Hopkins* Court that the defendant could avoid liability by proving it would have taken the same action even without any discriminatory motivation. Instead, Congress gave the employer an opportunity to limit the plaintiff's remedies in certain cases by providing that:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent

> demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor the court–
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Section 107(b), codified at 42 U.S.C. § 2000e-5(g)(2)(B)(i)-(ii).

In answering the question before the Court of whether a Title VII plaintiff must present "direct" evidence to obtain an "a motivating factor" jury instruction pursuant to 42 U.S.C. § 2000e-2(m), the Court should first determine whether the statutory language has a plain and unambiguous meaning. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). If so, the inquiry must end as long as the statutory scheme is "coherent and consistent." *Id.* (internal quotation omitted). The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context for the statute as a whole. *Id.* Courts must presume that "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

The statutory language here is plain. Congress has provided that, in any disparate treatment case,[2] a Title VII plaintiff proves the defendant acted "because of" discrimination by showing unlawful bias was "a motivating factor" in the employment practice at issue. The Court should hold that when Congress said "any employment practice" it meant "any." As the *en banc* court properly held in this case, the Civil Rights Act of 1991 sets "a motivating factor" as the causation standard for all cases of Title VII disparate treatment discrimination. *Costa v. Desert Palace Inc.*, 299 F.3d 838, 850-51 & n.2 (9th Cir. 2002) (en banc); *accord Harris v. Shelby County Bd. of Ed.*, 99 F.3d 1078, 1084 (11th Cir. 1996) ("the plaintiff in a Title VII action prevails whenever he or she proves that one of the delineated characteristics was a 'motivating factor' behind a particular employment decision").

If Congress had intended to limit section § 2000e-2(m) to only those cases where the plaintiff has "direct" evidence, one would have expected to find some indication of that in the statutory text, or the legislative history. It is not to be found. It is hard to believe that if Congress meant to limit the application of section 2000e-2(m) to only plaintiffs who have "direct" evidence, it did not say so there or in section 2000e-(m), particularly since such a requirement would be a sharp departure from general legal principles.

The Court has held that in a Title VII case, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *United States Postal Serv. Bd. of*

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[2] The provision's "[e]xcept as provided elsewhere in this subchapter" language refers, for example, to the different standard of causation for disparate impact cases set forth in 42 U.S.C. § 2000e-2(k).

Governors v. Aikens, 460 U.S. 711, 714 n.7 (1983). Juries are routinely instructed "that the law makes no distinction between the weight to be given to either direct or circumstantial evidence." 1 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice & Instructions* § 15.02, at 441-42 (3d ed. 1977). Federal pattern jury instructions are in accord.[3]

As the Second Circuit has noted, "[i]f a jury can give equal or greater weight to circumstantial evidence, then requiring only 'direct' evidence to sustain a plaintiff's burden of proof is not only unhelpful, it is baffling." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir. 1992); *accord Thomas v. NFL Players Ass'n*, 131 F.3d 198, 203-05 (D.C. Cir. 1997).[4] Insistence upon the production of "direct" evidence before a plaintiff may take advantage of the statutory "a motivating factor" causation standard, or limiting that standard to "mixed-motives" cases, confuses (1) the standard for causation, (2) the type of evidence necessary to meet that standard, and (3) a defendant's affirmative defense that it had more than one motivation with respect to the employment practice at issue. *Costa*, 299 F.3d at 851.

The Government's attempt to rewrite the Civil Rights Act of 1991 to infer a "direct" evidence requirement is

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3 *See* The United States Courts of Appeal Fifth Judicial Circuit Pattern Jury Instructions (civil cases) 2.18 (1999); Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit 1.02 (April 2001); Ninth Circuit Manual of Model Civil Jury Instructions (Civil) 3.5 (2001); Eleventh Circuit Pattern Civil Jury Instruction (Civil Cases) 2.2 (1999).

4 These decisions, as well as *Harris v. Shelby County Bd. of Ed.*, cited above, belie the Government's claim that the Ninth Circuit's decision in this case stands alone. Brief of the United States ("Govt. Br.") at 17.

unpersuasive. The Government asserts "any employment practice" as used in section 2000e-2(m) does not really mean that. It argues that this provision applies only in "mixed-motives cases." Govt. Br. at 18. The Government asserts that by including the phrase "even though other factors also motivated the practice" at the end of section 2000e-2(m), Congress intended for this section to apply only when the defendant is motivated by a combination of lawful and unlawful motives, but not when the defendant's motivations are wholly unlawful. *Id.* at 19. This argument ignores the accepted rules of statutory construction and defies common sense.

The Government effectively rewrites "even though other factors also motivated the practice" to read "but only when other factors also motivated the practice." The obvious reason for Congress's inclusion of the final clause of section 2000e-2(m) was to remove any doubt that a plaintiff could establish an unlawful employment practice by proving illegal bias was "a motivating factor" in the defendant's decision-making, regardless of whether other factors motivated the defendant. The text of section 2000e-2(m) provides no support for the Government's position.

The Government next argues that if Congress had really intended for the "a motivating factor" causation standard to apply to all disparate treatment cases, it would have amended section 2000e-2(a), rather than adding a separate, new statutory provision. *Id.* at 19. This would not, however, have accomplished Congress's intent. Section 2000e-2(a) applies only to unlawful employment practices committed by "employers." The prohibitions on unfair employment practices by employment agencies, labor organizations, and training programs are set forth in sections 2000e-2(b), (c) & (d), respectively. If Congress had

followed the Government's approach, Congress would have needed to amend separately sections 2000e-2(a), (b), (c) and (d) with "a motivating factor" language to cover all Title VII defendants. Congress wisely decided to save itself considerable trouble by amending section 2000e-2 once rather than four times.

The Government does not fare any better in its reliance on Congress' reference to section 2000e-2(m) in section 2000e-5(g)(2)(B) as an indication that Congress intended section 2000e-2(m) to apply only to "mixed motives" cases. *Id.* at 20. Congress obviously concluded that it was simpler to add a single provision specifying how a plaintiff proves a defendant acted "because of" discrimination, with a single reference to it in section 5(g)(2)(B), rather than references to at least four separate, amended provisions.

The Government's contention that section 2000e-2(m) does not apply to single motive, "pretext cases" litigated under the *McDonnell Douglas-Burdine* framework also leads to absurd results. The Government essentially argues that plaintiffs must show "but-for" causation to establish liability in single motive, pretext cases, but need show only discrimination was "a motivating factor" in "mixed motives" cases. Under the Government's reading of the statute, Congress intended a plaintiff to have a higher burden of proving causation when the defendant is motivated solely by illegal discrimination than when the defendant has both lawful and unlawful motives. The Government has offered no conceivable reason for a proof scheme so contrary to common sense. For this reason as well, the Court should reject the Government's strained construction of section 2000e-2(m).

In sum, the text, structure and purposes of Title VII show that in all disparate treatment cases arising under the Civil Rights Act of 1991, the plaintiff proves the defendant acted "because of " discrimination in violation of the statute by showing that unlawful bias was "a motivating factor." No "direct" evidence is required.

III. *Hopkins* Does Not Require A Plaintiff To Have "Direct" Evidence To Shift The Burden Of Persuasion To The Defendant, And, In Any Event, The Civil Rights Act Of 1991 Modifies The Applicable Holding Of That Case.

Petitioner and its *amici* contend that (1) *Hopkins* requires a plaintiff to have "direct" evidence of discrimination, and (2) that Congress intended to alter *Hopkins* only with respect to the consequences of the defendant's proof that it would have made the same decision absent any unlawful motivation. This argument is wrong on both counts.

A. Justice White's Opinion Controls *Hopkins*.

Writing for a plurality of four in *Hopkins*, Justice Brennan concluded that "because of" as used in Title VII did not mean "but-for" causation. 490 U.S. at 240. Instead, the plurality read the statute's several prohibitions on acting "because of" a discriminatory motive to prohibit a defendant from even taking an illegal criterion into account. The plurality determined that in order to show the defendant acted "because of" discrimination, the plaintiff had to show merely that illegal bias was "a motivating factor" in the defendant's conduct. *Id.* at 250-51. The plurality looked to *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393

(1983), as the basis for its framework of shifting the burden of persuasion to the defendant. *Hopkins*, 490 U.S. at 247-50, 254, 257.

Justice White largely agreed with the plurality's approach. He concurred with the plurality's reliance on *Mt. Healthy* as the source for the framework the Court was adopting in *Hopkins*. *Id.* at 258-60. Precisely because Justice White believed that *Mt. Healthy* provided the exact framework for analyzing Title VII cases, to shift the burden of persuasion he required the plaintiff to show unlawful bias was "a substantial factor," and not just "a motivating factor," in the defendant's action. *Id.* Petitioner concedes Justice White's opinion is straightforward application of *Mt. Healthy*. Pet. Br. at 14.

Justice O'Connor's concurrence parted ways with the plurality more fundamentally than did Justice White's. Justice O'Connor concluded the words "because of" in Title VII meant "but-for" causation. *Id.* at 262-63.[5] Like Justice White, Justice O'Connor required the plaintiff to show unlawful bias was "a substantial factor," and not just "a motivating factor," to shift the burden of persuasion. Unlike Justice White, Justice O'Connor required the plaintiff to demonstrate this through "direct" evidence.

Relying on *Marks v. United States*, 430 U.S. 188 (1977), Petitioner and its *amici* contend that Justice O'Connor's opinion constitutes the holding of the Court in *Hopkins*, because it constitutes the "narrowest" ground of

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5 Justice White took no position on this question, as he considered the difference to be mere semantics, given that six Justices agreed the plaintiff recovered nothing if the defendant proved a "same action defense." *Id.* at 259.

decision. This is clearly incorrect. *See Nichols v. United States*, 511 U.S. 738, 743-47 (1994); *Waters v. Churchill*, 511 U.S. 661, 685-86 (1994) (Souter, J., concurring) (explaining how to apply *Marks* where five Justices agree on some, but not all, aspects of the plurality opinion).

In *Hopkins*, five Justices agreed that a plaintiff did not have to introduce "direct" evidence to shift the burden of persuasion to the defendant. Justice White's strict adherence to *Mt. Healthy*, which does not require a plaintiff to have "direct" evidence to shift the burden of persuasion,[6] leaves no doubt where he stood on this question. Only four Justices in *Hopkins*--Justice O'Connor and the three dissenters--concluded that a Title VII plaintiff must have "direct" evidence to shift the burden of persuasion.

Therefore, the holding of *Hopkins* is that if a plaintiff proves, by direct or circumstantial evidence, that unlawful bias was a substantial factor in the defendant's actions, the burden of persuasion shifts to the defendant to show it would have made the same decision in any event. This is still the rule, however, only for cases to which the 1991 amendments to Title VII do not apply.[7]

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6 Nine of the 10 circuits to have considered the question have held that *Mt. Healthy* does not have a direct evidence requirement: *Lynch v. City of Boston*, 180 F.3d 1, 12 (1st Cir. 1999); *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1075 (3d Cir. 1990); *Gonzales v. Dallas County*, 249 F.3d 412 n.6 (5th Cir. 2001); *Sowards v. Loudon County*, 203 F.3d 426, 431 n.1 (6th Cir. 2000); *Pugh v. City of Attica*, 259 F.3d 619, 629 (7th Cir. 2001); *Allen v. Iranon*, 283 F.3d 1070, 1074-75 (9th Cir. 2002); *Ballard v. Muskogee Reg'l Med. Ctr.*, 238 F.3d 1250, 1252 (10th Cir. 2001); *Spanier v. Morrison's Mgmt. Servs. Inc*, 822 F.2d 975, 979-80 (11th Cir. 1987); *contra Graning v. Sherburne Cty.*, 172 F.3d 611, 615 (8th Cir. 1999).

7 Petitioner contends that affirming the Ninth Circuit would lead

B. Congress Adopted the *Hopkins*' Plurality's Approach To Shifting The Burden Of Persuasion.

Even if Petitioner were correct that *Hopkins* itself requires the plaintiff to have "direct" evidence to shift the burden of persuasions to the defendant, Congress overruled any such requirement in the 1991 amendments to Title VII.

By providing in section 2000e-2(m) that a plaintiff "establishes" an unlawful employment practice in violation of Title VII by demonstrating that unlawful bias played "a motivating factor" in the defendant's action, Congress endorsed the *Hopkins* plurality's interpretation that "because of" meant something less than "but-for" causation. Section 2000e-2(m) unambiguously adopts the plurality's "a motivating factor" causation threshold for shifting the burden of persuasion to the defendant. Congress thus repudiated the "a substantial factor" threshold that five Justices had endorsed in *Hopkins*. Moreover, by adopting the *Hopkins* plurality's test for when the burden of persuasion shifts to the defendant, Congress necessarily rejected any need for "direct" evidence.[8]

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to "confusion" in that some claims could be proved by showing discrimination was "a motivating factor" and some would have a higher burden of causation. Pet. Br. 27. For whatever reason, Congress excluded ADEA claims from section 2000e-(2)(m). The Court must enforce the statute Congress wrote, regardless of its wisdom.

[8] The Government cites a 1992 EEOC Enforcement Guide as support for its position that Congress endorsed a "direct" evidence requirement in the Civil Rights Act of 1991. Govt. Br. at 18. This section of the Enforcement Guide does not bear the weight the Government attempts to place on it. The EEOC intended this Enforcement Guide merely to "provide[] general information on the evaluation of charges" filed with the EEOC, for the benefit of agency investigators. *EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment* (BNA) 405:6915 (July 7, 1992). It is not, and does not purport to be, a definitive EEOC interpretation of *Hopkins* or the Civil Rights Act of 1991, and is entitled to no deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In any event, the Enforcement Guide recognizes that "direct" evidence is not required to shift the burden of persuasion to the defendant. EEOC Enforcement Guide at n.18

Relying on one out-of context sentence in the legislative history of the 1991 amendments, Petitioner and its *amici* argue that Congress intended to overrule only "one aspect" of *Hopkins, i.e.*, that a plaintiff who proves unlawful bias played some part in the defendant's actions receives no relief if the defendant proves a "same action" defense. This is clearly wrong, even under Petitioner's erroneous reading of *Hopkins* and section 2000e-2(m).

Petitioner and its *amici* simultaneously claim: (1) that Justice O'Connor's concurring opinion controls *Hopkins* and (2) that section 2000e-2(m) applies to, and only to, "mixed motives" cases proved by "direct" evidence. Justice O'Connor's concurrence requires the plaintiff to prove that an unlawful bias was "a substantial factor" before the burden of persuasion shifts to the defendant, but section 2000e-2(m) lowers this threshold to "a motivating factor." Therefore, even under Petitioner's erroneous interpretation of the 1991 amendments to Title VII, Congress did more than just change the result when the defendant proves it would have taken the "same action" absent any unlawful motivation.

The legislative history of the 1991 Civil Rights Act makes clear that Congress did not read *Hopkins* to establish any sort of a "direct" evidence requirement. The very same

legislative history on which Petitioner and its *amici* rely sets forth what Congress considered to be the three significant holdings of *Hopkins*: (1) sex-stereotyping evidence is sufficient to prove gender discrimination; (2) the defendant not need prove a "same action defense" by clear and convincing evidence; and (3) where such a defense is proved, the plaintiff receives no relief. H.R. Rep. No. 102-40(I), pt. 1, at 45 & n.39 (1991). Conspicuously absent is any mention of a "direct" evidence holding. Because Congress did not believe *Hopkins* required the plaintiff to produce "direct" evidence of discrimination, it did not silently incorporate such a requirement from that case into the Civil Rights Act of 1991.

IV. *McDonnell Douglas-Burdine* Remains A Vital Tool For Resolving Whether A Title VII Defendant Acted "Because Of" Unlawful Discrimination.

Petitioner and its *amici* repeatedly assert that if the Court holds Title VII does not contain a "direct" evidence requirement, this will render obsolete the *McDonnell Douglas-Burdine* framework. Pet. Br. at 30-33; Govt. Br. at 23-24; Chamb. Br. at 15-16. This argument fundamentally misunderstands the function of *McDonnell Douglas-Burdine*, as well as the nature of "pretext" evidence. The 1991 amendments to Title VII do not erode *McDonnell Douglas-Burdine*.

McDonnell Douglas-Burdine "is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577. This framework "was never intended to be rigid, mechanized, or ritualistic." *Id.* In enacting section 2000e-2(m), Congress modified the statutory definition of when a Title VII defendant acts

"because of" discrimination. By arguing that the Court should not apply the plain language of the statute, lest there be any diminution of *McDonnell Douglas-Burdine*, Petitioner and its *amici* have elevated a judicially-created evidentiary tool over an express Congressional mandate.

Over a quarter of a century ago, the Court held that *McDonnell Douglas* is simply one method for pursuing the inquiry whether the defendant acted "because of" discrimination. *Furnco*, 438 U.S. at 577. The framework "progressively sharpen[s] the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n.8. This is because the fact-finder's disbelief of the reasons put forward by the defendant, together with the elements of the *prima facie* case, suffices to show intentional discrimination. *Reeves*, 530 U.S. at 147. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.*

A defendant's explanation for its actions can be pretextual in three ways. The proffered reason may (1) be factually false; (2) have played no role in the employment action at issue; or (3) have not been a "but-for" cause of the action. *E.g.*, *Wolf v. Buss (Am.) Inc.*, 77 F.3d 914, 919 (7th Cir 1996); *Dews v. A.B. Dick Co.*, 231 F.3d 106, 1021 (6th Cir. 2000).[9] "Pretext" evidence is just as useful whether the defendant has offered one or more than one legitimate reason

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[9] The following are the three types of pretext evidence. Assume a defendant asserts that it fired the plaintiff, who claims sex discrimination, because she was late to work every day for two weeks. The plaintiff can prove this explanation is pretextual by showing (1) she was on-time everyday; (2) she was late, but the defendant did not consider her lateness in firing her; or (3) the defendant considered her lateness, but would not have fired her if she had been a man.

for its actions. *Costa*, 299 F.3d at 857.

"One of the employer's purportedly legitimate explanations may be pretextual. On the other hand, another may not." *Id.* In a "mixed-motives" case the plaintiff will, in an effort to obtain damages, try to convince the fact-finder that the reasons the defendant claims would have caused it to take the same action even absent discrimination are unworthy of belief and pretextual. Therefore, the Ninth Circuit correctly held that "*McDonnell Douglas* and 'mixed motive' are not two opposing types of cases. Nor are "single motive" and "mixed motive" cases fundamentally different categories of cases." *Id.*[10]

At the summary judgment stage, a Title VII plaintiff must create a genuine issue whether discrimination was "a motivating factor" in the defendant's actions. Where the plaintiff invokes *McDonnell Douglas*, the trial court should apply that framework as set forth in this Court's precedents. If the evidence in the record, taken in the light most favorable to the plaintiff, including any pretext evidence, permits a reasonable jury to infer that discrimination was "a motivating factor" in the defendant's conduct, the trial court should deny summary judgment.

Under the Civil Rights Act of 1991, a plaintiff establishes liability, and may obtain some relief, even where discrimination was not a "but-for" cause of the defendant's conduct. For this reason, the plaintiff need not prove that all of the defendant's proffered explanations are pretextual, as

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10 The Government recognized this when briefing the *Hopkins* case: "we think the correct legal analysis should not vary depending on whether the case is categorized as one involving 'mixed motives' or 'single motives.'" *Hopkins v Price Waterhouse*, Brief of the United States, <http://www.usdoj.gov/osg/briefs/1987/sg870104.txt>.

long as a reasonable jury could find that discrimination was "a motivating factor." *Fields v. N.Y. State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 121-22 (2d Cir. 1997).[11]

Costa assumes that the trial judge will always be able to decide whether to categorize a particular case as "single motive" or "mixed-motives" before submitting it to the jury. *Id.* at 856-57 (citing *Hopkins*, 490 U.S. at 247 n.12 (plurality opinion)). Unfortunately, this may not be true. There will be cases where the defendant argues that all of its motives were non-discriminatory but, as a second line of defense, contends it would have made the same decision in any event. Where the defendant offers multiple reasons for its actions, the plaintiff may initially argue that all of them are pretexts for discrimination. As a fall-back position, the plaintiff may contend that even if some of the defendant's given reasons are factually true, discrimination was at least "a motivating factor" in the employer's actions. Sometimes the plaintiff will frame the case as "single motive," but the defendant will frame it as "mixed-motives." Furthermore, the trier-of-fact "may choose not to accept either party's litigating position as reflecting the whole truth." *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995).

Jury instructions must take into account the practical

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11 Several circuits have erroneously stated the defendant prevails at the summary judgment stage if the plaintiff does not have sufficient evidence from which a jury could find that all of the articulated reasons are pretexts for discrimination. *E.g, Fuentes v. Perskie*, 32 F.3d 759, 764-65 (3d Cir. 1994); *Wilson v. Am. Gen. Corp.*, 167 F.3d 1114, 1120 (7th Cir. 1999); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000); *Wascura v. City of S. Miami*, 257 F.3d 1238, 1243 (11th Cir. 2001). This reasoning contradicts the plain language of 42 U.S.C. § 2000e-2(m).

reality that whether a case is actually "single motive" or "mixed-motives" may depend on the jury's resolution of specific disputed facts. Jury instructions must also permit the plaintiff and/or the defendant to argue "single motive" or "mixed-motives" in the alternative. The jury instructions and special interrogatories given here permitted the parties and the jury such flexibility. They also correctly set forth the questions a jury must consider in deciding the defendant's liability and the plaintiff's entitlement to monetary damages.

In any case subject to the Civil Rights Act of 1991, the court should inform the jury it must first decide whether discrimination was "a motivating factor" in the employment action at issue.[12] If the jury answers "no," the plaintiff loses. If the answer is "yes," the defendant is liable. The jury must next decide whether the defendant showed that lawful motivations also played a part in its action. If the jury answers "no" to this second question, then the case is a "single motive" situation, and the plaintiff is entitled to damages.

If the jury answers "yes" to the second question, a "mixed-motives" case has arisen. The jury then must decide whether the employer has shown it would have reached the same decision based only upon lawful reasons. If the answer to the third question is "no," the plaintiff is entitled to damages. If the response to the third question is "yes," the plaintiff is not entitled to damages. Thus, the Ninth Circuit's pattern jury instructions, which were given here, work for "single motive" and "mixed-motives" cases alike.

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[12] The instructions should probably set forth a definition of "a motivating factor." *Hopkins* provides the appropriate language: "whether gender was a factor in the employment decision at the moment it was made." 490 U.S. at 241 (plurality opinion; emphasis deleted). *See* Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit 5.96 (Apr. 2001).

A court should give these same instructions in a case where the plaintiff relies on the *McDonnell Douglas-Burdine* framework. In such a case, however, additional instructions may be required. The jury should not be instructed on the framework's shifting burdens of productions and presumptions. *Hicks*, 509 U.S. at 509-10 & n.3. The *McDonnell Douglas* framework is, however, relevant to certain factual issues the jury may have to decide.

To prevail at trial, the plaintiff must factually establish all of the elements of her *prima facie* case. *Reeves*, 530 U.S. at 142. In many cases, the elements of the *prima facie* case will be undisputed, or the court can find them established as a matter of law. There may well be some cases where there is a genuine dispute whether the plaintiff has proven one of the elements of her *prima facie* case. If so, the jury should resolve this factual question. Where the elements of the *prima facie* case are undisputed, or have been established as a matter of law, the jury instructions need not even mention the phrase "*prima facie* case" or discuss its elements.

Either way, the court should inform the jury of the employer's articulated nondiscriminatory reason(s) for its actions. In accordance with the principles set forth in *Reeves*, as modified by 42 U.S.C. § 2000e-2(m), the jury should be told that if it disbelieves one or more of the defendant's reason(s) for its actions, then it may, but is not required to, find that discrimination was "a motivating factor" in the conduct at issue.[13] In this way, the jury will be instructed that it may "infer the ultimate fact of intentional discrimination" if it finds the employer's

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[13] *See* Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit 5.95 (Apr. 2001).

proffered reason "unpersuasive" or "unworthy of credence." *Reeves*, 530 U.S. at 146-147; *Hicks*, 509 U.S. at 511.

There is a split in the circuits whether it is an abuse of discretion for a court to refuse to give a "pretext instruction" where the evidence warrants it.[14] The more persuasive opinions reason that

> without a charge on pretext, the course of the jury's deliberations will depend on whether jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from the evidence establishing the plaintiff's prima facie case and the pretextual nature of the employer's proffered reasons for its actions. It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.

Smith v. Borough of Wilkinsburg, 147 F.3d 272, 281 (3d Cir. 1998). Here, the plaintiff did not request a "pretext instruction," and the court's failure to give one certainly caused no prejudice to Petitioner. As set forth above, the trial court gave the legally correct Title VII disparate treatment jury instructions for cases arising under the 1991 Civil Rights Act, with or without "direct" evidence.

[14] Three circuits have held such an instruction is mandatory: *Townshend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998); *Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994). Two circuits have held it is not mandatory: *Palmer v. Bd. of Regents of the Univ. Sys. of Ga.*, 208 F.3d 969 (11th Cir. 2000), and *Gering v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994). In *dicta*, two circuits have expressed doubt that such an instruction is mandatory: *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786 (8th Cir. 2001) and *Fite v. Digital Equip. Corp.*, 232 F.3d 3 (1st. Cir. 2000). In *Cassino v. Reichold Chem. Inc.*, 817 F.2d 1338, 1344 (9th Cir. 1987), the court rejected a defendant's argument that the jury should be instructed that it must find both that discrimination was a "but-for" cause of the defendant's conduct and that the employer's reason was unworthy of belief, because such an instruction would have improperly required the jury to find that discrimination was the sole reason for the defendant's actions.

V. Any Attempt To Define "Direct" Evidence Is Futile.

Petitioner and its *amici* concede that the courts of appeals are in sharp disagreement over what constitutes "direct" evidence. They spend many pages vainly striving to make sense of the various definitions. Their briefs well document the confusion engendered by the ultimately futile attempt to define "direct" evidence. Indeed, Petitioner and the Government cannot even agree upon which definition of "direct evidence" the Court should adopt. *Compare* Pet. Br. at 40-43 with Govt. Br. at 24-29. No answer is what the wrong question begets. There is no reason for the Court to venture into the thicket of what is and is not "direct" evidence. The Civil Rights Act of 1991 establishes that a defendant violates the law if discrimination is "a motivating factor" in its conduct. As long as the jury finds by a preponderance of the evidence that the defendant acted "because of" discrimination, it makes no difference whether the jury reached this conclusion on the basis of direct or circumstantial evidence.

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Ninth Circuit should be AFFIRMED.

Respectfully submitted,

MICHAEL C. SUBIT*
FRANK, FREED, ROBERTS
SUBIT, & THOMAS, LLP
705 SECOND AVENUE
SUITE 1200
SEATTLE, WA 98104
(206) 682-6711
* *Counsel of Record*

BARBARA R. ARNWINE
THOMAS J. HENDERSON
MICHAEL L. FOREMAN
KRISTIN M. DADEY
THE LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
(202) 662-8600

THOMAS W. OSBORNE
LAURIE A. MCCANN
DANIEL B. KOHRMAN
AARP FOUNDATION LITIGATION
MELVIN RADOWITZ
AARP
601 E Street, NW
Washington, DC 20049

DENNIS C. HAYES
GENERAL COUNSEL
YOLANDA Y. RILEY
THE NATIONAL
ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
Persons
4805 Mt. Hope Drive
Baltimore, MD 21215

ANDY IMPARATO
PRESIDENT & CEO
AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES
1629 K Street, NW
Suite 503
Washington, DC 20006

STEPHEN R. SHAPIRO
LENORA M. LAPIDUS
JENNIFER ARNETT LEE
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, NY 10004

VINCENT A. ENG
NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM
1140 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036

JUDITH L. LICHTMAN
JOCELYN C. FRYE
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1875 Connecticut Avenue, NW
Suite 650
Washington, DC 20009

Counsel for *Amici Curiae*